

**Testimony of
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**Before the
House Subcommittee on Commercial and Administrative Law
*“Implementation of the U.S. Department of Justice’s
Special Counsel Regulations”*
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INTRODUCTION

Thank you Chairman Conyers, Representative Smith, and members of the House Subcommittee on Commercial and Administrative Law for inviting me to speak to you today. I appreciate the time and attention that your Subcommittee is devoting to the implementation of the U.S. Department of Justice’s Special Counsel Regulations.

The Special Counsel Regulations derive from two principles fundamental to our nation’s prosecutorial system since the Founding: accountability and the need to take care that the laws be faithfully executed. When I joined the staff of the Deputy Attorney General in 1998, I was asked to convene a department-wide group to develop a set of policy recommendations regarding the potential renewal of the Independent Counsel Act. After much internal debate, those recommendations (including the Department’s position that the Independent Counsel Act be permitted to lapse) were announced in testimony to this Committee by the Deputy Attorney General on March 2, 1999. Subsequently, Attorney General Reno tasked me with drafting the internal DOJ regulations that would form the basis for the appointment of a Special Counsel. After a wide-ranging consultation, both within the Department and with this Committee and others in Congress, the regulations became effective on June 30, 1999.

You have asked me here to discuss the development and meaning of these Special Counsel regulations, as well as how they have been implemented since they have taken effect. I have therefore concentrated the bulk of my testimony on these matters, though I will also discuss the recent

investigation regarding Central Intelligence Agency (CIA) videotape destruction toward the end of my testimony.

With respect to the CIA tapes investigation, it is my view that recent testimony by Attorney General Mukasey, stating that the Justice Department will not investigate the underlying conduct on the destroyed tapes, including confirmed instances of waterboarding, highlights a strong possible need for a special counsel. The Attorney General told this committee that waterboarding “cannot possibly be the subject of a criminal – a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.”¹ This statement reflects the complicated institutional dynamics of the CIA tapes investigation, one in which the Department must investigate not just the CIA but also itself. And it underscores why the appointment of a Special Counsel may be appropriate in this case.

Attorney General Mukasey took the position that he did not want to open an investigation into waterboarding and other extreme interrogation techniques because interrogators relied in good faith on legal opinions issued by the Office of Legal Counsel (OLC) in 2002 holding that waterboarding was permissible. This position may be justified, depending on what the OLC opinions say. These opinions may indeed advise interrogators that waterboarding and other extreme interrogation techniques are legal in certain situations, but it is, quite literally, impossible to assess this claim without seeing the opinions themselves.

The Attorney General’s decision to forbid prosecution of waterboarding or other extreme interrogation techniques, moreover, precludes an independent judicial examination into the OLC opinions. In many “good faith reliance” cases, an indictment is brought and the prosecutor and defendant battle over the reliance in court. A judge ultimately makes the decisions about whether the defendants have reasonably relied in good faith. In order to make that evaluation, the judge must consider the defendant’s conduct in light of the specific authorization – in this case, the OLC opinions. Only by comparing the actual conduct to the

¹ Testimony of Attorney General Mukasey before the House Judiciary Committee, Feb. 7, 2008.

specific authorization can a proper determination be made as to whether the defendant reasonably relied on government authority. Here, the Attorney General is foreclosing that process. There very well may be legitimate grounds for this decision, since a prosecutor is obligated to consider good faith reliance before indicting an individual. But without knowing what the underlying legal opinions say, it is quite difficult to know whether the Department of Justice has taken the right course in this instance.

I deeply believe that the executive branch should have a zone of secrecy to operate, and legal opinions that disclose the existence of secret warfighting techniques should not be publicly disclosed except in extreme circumstances. But that claim does not, and cannot, apply to waterboarding. After all, the underlying legal opinions on which the Attorney General claims officials relied have now been withdrawn.² The use of this technique has already been confirmed by our nation's top intelligence officials in testimony to Congress. And, most importantly, the Attorney General and the Director of the CIA have both told this committee that America is not using waterboarding today. Given these facts, and the important legislative interest in the issue, the Attorney General should, at a minimum, disclose the waterboarding opinions to this Committee.

The Administration has elevated these OLC legal opinions into a status akin to law – using them as definitive interpretations of this Congress's work-product – legislation of the Congress of the United States. Just as our Founders would not have tolerated secret laws made by the Congress, they would not have tolerated a system of secret law by the Executive Branch – particularly on an issue of such utmost importance to our national character. The Attorney General's position, evidently, is that the “law” made by his Department is so secret that even this body, the

² Although the original OLC opinions authorizing waterboarding have been withdrawn, the Administration has not acknowledged that waterboarding is now unlawful. In fact, Stephen Bradbury, the Principal Deputy Assistant Attorney General, testified before the House Judiciary Committee on February 14, 2008, that there has not been a determination that waterboarding is unlawful. Accordingly, disclosure to this Committee of the OLC opinions related to waterboarding and other extreme interrogation techniques is not only necessary to this Committee's oversight responsibilities, but also its legislative role. In order to develop appropriate legislation in this area, Congress must know how the Administration has interpreted existing laws including the federal torture statute, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions, as codified in the Military Commissions Act.

Congress of the United States (a body that the Constitution vests with responsibility for making law in Article I), cannot be told about it.

If the Attorney General does not disclose these opinions, he will essentially be asking Congress to let him shut down a potential criminal investigation on the basis of a putative good faith defense based on secret opinions that Congress has never seen. If the Attorney General refuses to disclose these opinions to appropriate individuals in Congress, then Congress may very well be justified in questioning his conclusions about “good faith reliance,” and may instead insist on the formal appointment of a Special Counsel to review the underlying OLC opinions.

Regardless of what course of action is ultimately pursued with respect to the OLC waterboarding opinions, at a minimum, the reporting requirements in the Special Counsel regulations should be made applicable to the CIA tapes case immediately. Those requirements direct the Attorney General to notify Congress when “the Attorney General [has] concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”³ While I am generally wary of “independent” and “special” investigations, I recognize that some extraordinary circumstances call for them.⁴ And in some cases, even if there is no need for a fully independent investigation, there is still a need for the investigation to use procedures modeled on those in the special counsel regulations to protect against interference or conflict of interest. The CIA tapes matter appears to be one of those circumstances for which the reporting requirements in the DOJ regulations were designed. Specifically, the Attorney General should report to Congress about the scope of authority currently given to Mr. John Durham, and should also report if he rejects a proposed action by Mr. Durham or alters (or refuses to alter upon request) the scope of Mr. Durham’s authority and mandate in this investigation.

Given Attorney General Mukasey’s well-deserved reputation for independence and honesty, I do not believe that his interference (or that of his Deputy) is likely in the investigation now being undertaken by Mr.

³ DOJ Special Counsel Regulations, 64 Fed. Reg. 37038-01, 37038 (July 9, 1999) (codified at 28 C.F.R. pt. 600.9).

⁴ See Neal Katyal & Viet Dinh, *Let Justice Take Its Course*, N.Y. TIMES, Oct. 2, 2003, at A31.

Durham. But our government was founded on the idea that checks and balances must be laced into the system to guard against mistakes made by well-meaning individuals.⁵ Applying the modest reporting requirement in the Special Counsel regulations will reassure the public that the Congress of the United States will be informed about any interference with such a sensitive investigation. As such, if Mr. Durham's investigation finds that no crime has occurred, the reporting requirement will shield the Administration from accusations of impropriety. And if, as I predict, no interference by the Attorney General takes place, the reporting requirement will have little effect, outside of the positive precedent it sets for other extremely sensitive investigations with future Attorneys General.

I. THE CURRENT REGULATIONS ACHIEVE THE PROPER BALANCE OF INDEPENDENCE AND ACCOUNTABILITY

After careful consideration based on the findings of a working group, the Department of Justice (DOJ) concluded in early 1999 that the Independent Counsel Act⁶ should not be reauthorized. Led by Deputy Attorney General Eric Holder, the working group identified problems inherent in the Act and determined that the processes set forth in that Act did not materially enhance public confidence.⁷ Although the Act increased the independence of Independent Counsels by removing many of the institutional constraints that ordinarily limit prosecutors, it failed to provide incentives to exercise restraint of this newfound power. As a result, the long-term interests of the DOJ were compromised.

The regulations promulgated in 1999 were the product of substantial input from Congress, including hearings led by Former Chairman Gekas and Senator Thompson. In March and April of 1999, both Mr. Holder and Attorney General Janet Reno testified before Congress, stating that the Department's position was that the Independent Counsel Act should not be renewed. Both of them stated that public confidence in the thoroughness, fairness, and impartiality of investigations of sensitive matters would be

⁵ See Federalist Paper No. 51 (James Madison).

⁶ 28 U.S.C. § 591-599 (2000).

⁷ See Letter from Dennis K. Burke, Acting Assistant Attorney General, U.S. Department of Justice, to George W. Gekas, Subcommittee on Commercial and Administrative Law Chair, U.S. House of Representatives (Apr. 13, 1999) (on file with author).

significantly enhanced by the appointment of an individual, outside of the normal organization of the Department, who retains a substantial degree of independence from its supervisory structure.⁸ After Congress stated its intent to allow the Independent Counsel Act to lapse, DOJ decided to amend its internal, existing regulatory regime which had been adopted in the mid-1980's as a reaction to judicial review of the Independent Counsel Act.⁹

The Special Counsel regulations enable the Attorney General to remain accountable in high-profile situations that require an investigation led by an individual with heightened independence, while also ensuring that the prosecution proceeds according to DOJ guidelines and regularized practices.¹⁰ Although recent investigations have tested the viability of the regulations, I believe that they retain the proper balance of independence and accountability in sensitive investigations and serve to enhance public confidence in the rule of law.

The DOJ Special Counsel regulations avoid many of the pitfalls of the now-expired statute governing the appointment of an Independent Counsel. In the past, Independent Counsels have been criticized for excessive zeal in performing their duties. Without significant oversight, or meaningful limits on their budget or jurisdiction, Independent Counsels could simply keep digging until they found dirt. Moreover, the requirement to submit a final, public report created a heavy incentive to justify their often significant expenditures by producing at least some evidence of wrongdoing. Once appointed, they could, and often did, investigate their target until they found some sort of evidence of wrongdoing, whether or not it was related to their initial charge.

The Justice Department Special Counsel regulations have several safeguards meant to make Special Counsels more accountable than prosecutors acting under the old Independent Counsel law. The budget and jurisdiction of the Special Counsel is controlled by the Attorney General,¹¹ which operates as a check on the scope of the Special Counsel's

⁸ See Letter from Burke to Gekas, *supra* note 7, at 2; see also Eric Holder, Deputy Attorney Gen., Announcement of the Special Counsel Regulations (July 1, 1999).

⁹ See Letter from Burke to Gekas, *supra* note 7, at 3.

¹⁰ "Special Counsel" is a term coined by the Department of Justice to distinguish the new position created in 1999 from the prior statutory Independent Counsels.

¹¹ 28 C.F.R. pt. 600.8(a)

investigation. In addition, the Attorney General may override the decisions of the Special Counsel. In practice, as discussed below, this will rarely happen, since the Attorney General will have to report any interference to Congress. However, this acts as another clear check on an independent counsel interpreting his mandate overly broadly. As a last resort, a Special Counsel may be removed by the Attorney General, subject to the limitations and congressional reporting requirement discussed below.

The Special Counsel also has less incentive to perform in the eyes of the public. Under Department regulations, the Special Counsel must still submit a final report, but it is a private report submitted to the Attorney General, who presumably will not be disappointed by a finding that no crime occurred. Thus, if the Special Counsel finds no evidence of wrongdoing, he does not have the Independent Counsel's incentive to justify his appointment by finding something – anything – amiss. The Attorney General may choose to submit this report to the public, if he feels that release would be in the public interest.¹²

I discuss in turn the provisions under each section of the regulations below.

§ 600.1 Grounds for Appointing a Special Counsel and
§ 600.2 Alternatives Available to the Attorney General

Sections 600.1 and 600.2 recognize that matters may arise in which public confidence in the thoroughness, integrity, and impartiality of an investigation would be significantly enhanced by the appointment of an individual outside of the normal organization of the DOJ. Situations in which this would be appropriate include allegations involving particular persons (such as the President, Vice President, or Attorney General) or situations where there is a potential for a significant conflict of interest (e.g. Watergate). When the facts create a conflict so substantial, or the exigencies of the situation are such that any preliminary investigation might taint subsequent investigation, it may be appropriate under these regulations for the Attorney General to appoint a Special Counsel immediately.¹³

¹² 28 C.F.R. pt. 600.9(c)

¹³ 28 C.F.R. pt. 600.

Alternatively, the Attorney General can direct a preliminary investigation of the factual and legal circumstances of the matter to better inform the decision.¹⁴ The regulations offer several viable approaches, even in cases where there seems an apparent conflict of interest, depending on the facts of the matter.¹⁵

The regulations do not require the appointment of a Special Counsel in every conflict of interest. Rather, the regulations make clear that only when there is conflict of a specific nature which makes it in the public interest to appoint an independent, outside investigator will a Special Counsel be appointed.¹⁶ Other matters where there may potentially be a conflict of interest can be handled through recusals of certain DOJ officials, as is done with personal and financial conflicts.¹⁷ (This is the case in the CIA tapes investigation, where the U.S. Attorney for the Eastern District of Virginia – who would ordinarily have handled the case – has been recused.) In addition, other conflicts may be so insubstantial that the Attorney General could conclude that the considerable cost of an independent Special Counsel investigation is not warranted. One such example would be a case in which the Attorney General personally knows the individual being investigated, but the individual is not a high ranking official.¹⁸ This conflict could be eliminated by having the Attorney General recuse himself, so appointing a Special Counsel would not be necessary.¹⁹

The decision of whether or not to appoint a Special Counsel is generally best left to the Attorney General's discretion, guided by an assessment of how the public interest would be best served. This creates a clear line of accountability for the actions of the Special Counsel. If a corrupt Attorney General used his discretion to further personal motives, his decision could still be challenged by the Deputy Attorney General, other DOJ officials, the President (through Article II supervisory and removal powers), and Congress (through Article I oversight and impeachment powers), as well as the public. In addition, since the Attorney General is responsible for these regulations (in contrast to the Independent Counsel

¹⁴ 28 C.F.R. § 600.2(b) (1999).

¹⁵ DOJ Special Counsel Regulations, *supra* note 1, at 37038.

¹⁶ *See* Letter from Burke to Gekas, *supra* note 7, at 2.

¹⁷ *Id.* at 4.

¹⁸ *See* Deputy Attorney General's Press Availability (July 1, 1999) (on file with author).

¹⁹ *See id.*

Act, a statutory creation), he cannot blame Congress for the appointment of—or lack of—a Special Counsel since the choice is that of the Attorney General and his alone.²⁰

Naturally, this leaves open the problem of how allegations against the Attorney General himself should be handled, as such a matter undeniably creates a stark conflict of interest. However, existing DOJ practice is for the Attorney General to be automatically recused from participation in a matter involving himself, and the next most senior DOJ official not implicated in the matter serves as Acting Attorney General for the purposes of the matter.²¹ The Acting Attorney General is then endowed with the discretion over whether to appoint a Special Counsel.

§ 600.3 Qualifications of the Special Counsel

Section 600.3 recognizes that appointing individuals with strong credentials—a “reputation for *integrity* and *impartial decisionmaking*, and with appropriate experience”—serves to allay public concern that the Special Counsel will not investigate thoroughly or without bias, even in situations where the DOJ has an acute conflict of interest.²² In order for the appointment of a Special Counsel to appease public concern, it is essential that the individual appointed be viewed by the public as impartial, unbiased, and experienced in high-level prosecutions. Since the Attorney General is fully accountable for the Special Counsel’s actions, the Attorney General will strive to ensure that the individual handles his or her responsibilities with the utmost dignity.

The regulations provide that the Special Counsel should be selected from outside the U.S. government, and upon appointment, must agree that their Special Counsel investigation will take “first precedence in their professional lives.”²³ However, Section 600.3 also reflects the fact that serving as Special Counsel is not always a full time position. A prosecutor rarely devotes all of his or her time to a single case; similarly, a Special

²⁰ *See id.*

²¹ *See* Letter from Burke to Gekas, *supra* note 7, at 4.

²² 28 C.F.R. § 600.3(a) (emphasis added).

²³ *Id.*

Counsel is not expected to devote one-hundred-percent of his or her time to the appointed investigation.

§ 600.4 Jurisdiction

Section 600.4(a) and (b) provide that the Special Counsel’s jurisdiction must be stated as an investigation of particular facts. Therefore, the drafters of the regulations limited the power and authority of the Special Counsel to the particular problem that led to his or her appointment; all other criminal investigations are left to regular DOJ procedures. However, to ensure that the Special Counsel has enough persuasion to be effective, jurisdiction automatically includes “the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, [the primary investigation], such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”²⁴

The drafters of the regulations also realized that situations in which Special Counsels are appointed are inherently fact specific and vary greatly from case to case, and so flexibility in jurisdiction would be extremely useful in solving problems. For example, the Special Counsel appointed to investigate an allegedly false statement about a government program may discover other allegations of misconduct with respect to that program, and may desire additional jurisdiction to investigate the new claims. As a result, § 600.4(b) acknowledges that the Attorney General may enlarge jurisdiction if it becomes “necessary in order to fully investigate and resolve the matters assigned.” The regulations set forth both a process by which Special Counsels are provided with a description of the limitations of their investigation and allow for adjustments if later required.

§ 600.5 Staff

Regulation 600.5 provides assignment of necessary personnel to assist the Special Counsel, and includes assignment of essential investigative resources from the Federal Bureau of Investigation. Typically, assigned personnel are Department of Justice employees, but the regulation also allows for additional personnel from outside the DOJ if necessary.

²⁴ 28 C.F.R. § 600.4(a).

§ 600.6 Powers and Authority

Expanded in response to Congressional input, Section 600.6 makes clear that Special Counsels are not line attorneys within the DOJ, but rather possess the “full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.”²⁵

§ 600.7 Conduct and Accountability

Accountability of the Special Counsel for the decisions he or she makes is “inherently in tension” with independence.²⁶ The Special Counsel should be given a large amount of independence in which to operate, but unchecked power brings with it the possibility for abuse. Accordingly, some restrictions on, and accountability for, the Special Counsel’s decisions are necessary. The regulations strike the proper balance between accountability and independence by making the Special Counsel similar in certain respects to a U.S. Attorney, free from the “day-to-day supervision of any [DOJ] official.”²⁷ This enhances both the independence and the impartiality of an investigation in several ways: the Special Counsel will have no considerable interest in the Department; no long-term position at stake; and no “political identification” with the Administration currently in power.²⁸

At the same time, §600.7(a) requires the Special Counsel to “comply with the rules, regulations, procedures, practices and policies” of the DOJ, and provides for review and approval procedures for Special Counsels similar to the procedures by which the DOJ addresses sensitive legal and policy issues facing its prosecutors.²⁹ Rather than imposing “mandatory substantive rules, the Department recognizes that even the most controversial and risky investigative or prosecutorial steps might in extraordinary circumstances be justified.” These issues are generally handled by requiring “a variety of levels of review and approval” before the step can be taken.³⁰ If Special Counsels were exempt from these procedures, they

²⁵ 28 C.F.R. § 600.6.

²⁶ Letter from Burke to Gekas, *supra* note 5, at 9.

²⁷ 28 C.F.R. § 600.7(b).

²⁸ *See* Letter from Burke to Gekas, *supra* note 75, at 10.

²⁹ 28 C.F.R. § 600.7(a).

³⁰ *Id.*

would be without controls or Departmental guidance when dealing with the most sensitive situations. Therefore, the regulations require that Special Counsels seek consultation with “appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department, including ethics and security regulations and procedures.”³¹

There are institutional reasons for supervisory review and approval provisions which transcend the merits of any one case. For example, when deciding whether to appeal a particular court decision, the DOJ may determine that long-term interests in case law development outweigh the benefit of any one prosecution. This interest is served by the DOJ’s requirement that the Solicitor General personally approve Departmental appeals. And, requiring Special Counsel compliance with certain DOJ review and approval procedures ensures that the Department’s institutional judgment will help inform the Special Counsel’s decisionmaking process in the case at hand. Most review and approval procedures involve career DOJ officials who possess invaluable long-term institutional memory and experience.³² Therefore, the regulations enable a “wide range of independent decisionmaking” by the Special Counsel, while simultaneously preventing the Special Counsel from becoming too “insulated and narrow in his or her view of the matter under investigation.”³³

Section 600.7(a) also allows the Special Counsel to proceed, in extraordinary circumstances, without complying with typical DOJ review and approval procedures, by consulting instead with the Attorney General. Bypass of standard DOJ procedures through direct consultation with the Attorney General affords the Special Counsel a substantial degree of independent decisionmaking, while simultaneously enhancing his or her accountability for the decision.³⁴

Although the Special Counsel is not subject to day-to-day supervision, Section 600.7(b) permits the Attorney General to determine that an action taken by the Special Counsel is so “inappropriate or unwarranted under

³¹ 28 C.F.R. § 600.7(a).

³² See DOJ Special Counsel Regulations, *supra* note 3, at 37039–40.

³³ *Id.*

³⁴ See *id.*

established Departmental practices that it should not be pursued.”³⁵ This is a high standard; the regulations specifically provide that the Attorney General’s review is to give substantial deference to the “views of the Special Counsel.”³⁶ Therefore, the Special Counsel is granted greater powers than that of a U.S. Attorney and the Attorney General remains accountable while still ensuring that the prosecution proceeds according to DOJ guidelines.

The regulations also protect the Special Counsel’s actions by providing that he or she can only be removed for “good cause” by the “personal action” of the Attorney General.³⁷ The regulations offer several examples of good cause, including “misconduct, dereliction of duty, incapacity, [and] conflict of interest.”³⁸ Although the good cause requirement is a departure from the standard for U.S. Attorneys in such a way that the Special Counsel is given heightened independence, it is not an absolute insulation and, as described in § 600.7(b) above, the Special Counsel remains accountable to the Attorney General.

The Special Counsel and his or her personnel are also subject to the same rules of ethical conduct and disciplinary procedures as other DOJ employees.³⁹

§ 600.8 Notification and Reports by the Special Counsel

(a) Annual Report and Budget

Section 600.8(a)(1) provides that the Attorney General must review and approve the Special Counsel’s budget proposal, which must include a request for personnel. This provision was developed in response to concern about the lack of an established budget as one of the “fundamental weaknesses of the operations” of Independent Counsels under the Independent Counsel Act.⁴⁰ However, the specific budgetary needs of any given investigation can be difficult to predict. Therefore, rather than listing specific requirements, the regulations provide that, with the assistance of the

³⁵ 28 C.F.R. § 600.7(b).

³⁶ *Id.*

³⁷ 28 C.F.R. § 600.7(d).

³⁸ *Id.*

³⁹ 28 C.F.R. § 600.7(c).

⁴⁰ Letter from Burke to Gekas, *supra* note 7, at 8.

Justice Management Division, a reasonable budget should be developed in a prompt fashion by any newly-appointed Special Counsel.

Section 600.8(a)(2) requires the Special Counsel to provide the Attorney General with an annual report on the status of the investigation and a budget request ninety days before the beginning of each fiscal year. The annual report is merely a “simple status report”;⁴¹ it is not meant as a mechanism for day-to-day supervision of Special Counsels, which is precluded by § 600.7(b). And, an annual report guarantees at least an annual opportunity for the Attorney General to review whether the investigation should continue and, if so, whether the budget should be maintained or supplemented for the coming year. Annual reporting also helps to ensure that the Special Counsel investigation does not continue indefinitely and better enables the Attorney General to determine whether the investigation has achieved its goals or should be terminated.

(b) Notification of Significant Events

This provision requires Special Counsels to notify the Attorney General of certain significant events occurring in the course of investigation. The circumstances for notification are defined using the same standard as that for U.S. Attorneys. Experience has dictated that sensitive, high-level prosecutions can lead to substantial political and legal repercussions; notification of proposed indictments and other important steps in the investigation is an essential mechanism through which the Attorney General can oversee the investigation.

(c) Closing Documentation

In drafting this provision, there was much concern that, like the Final Report requirement of the Independent Counsel Act,⁴² a requirement for closing documentation could foster over-investigation and, since it could possibly become a public document, potentially harm legitimate privacy interests.⁴³ It is generally appropriate for a federal official to provide a written record upon completion of an assignment, for historical

⁴¹ Letter from Burke to Gekas, *supra* note 7, at 11.

⁴² 28 U.S.C. § 594(h)(1)(B).

⁴³ Letter from Burke to Gekas, *supra* note 7, at 11.

documentation purposes as well as to enhance accountability.⁴⁴ The need to enhance accountability is particularly acute here, where the federal official has worked in a substantially independent manner with little Department supervision. Likewise, federal prosecutors routinely document their decisions not to continue to pursue significant cases, explaining the factual and legal reasons for their conclusions.

The primary problem with the Final Report requirement of the Independent Counsel Act was that the report was frequently made public. This departs from DOJ's practice for dealing with closing documentation in all other types of criminal investigations; it is also the principal contributor to over-investigation by the Special Counsel in order to avoid any source of public criticism. Therefore, these regulations require only a *confidential*, limited summary report to be provided to the Attorney General at the conclusion of the Special Counsel investigation. The Special Counsel final report is treated as a confidential document, as is all other internal documentation relating to federal criminal investigations. Like other provisions of the regulations, § 600.8 strikes the proper balance between the need for written documentation to enhance accountability and the desire to avoid over-investigation and harm to privacy interests.

The public's interest in Special Counsel investigations is addressed in § 600.9, below.

§ 600.9 Notification and Reports by the Attorney General

The regulations impose reporting requirements on the Attorney General for the purpose of enhancing congressional and public confidence in the integrity of the process.⁴⁵ Section 600.9(a) requires that the Attorney General report to the Judiciary Committees of the Congress on three occasions: 1) the appointment of a Special Counsel; 2) the Attorney General's Decision to remove a Special Counsel; and 3) upon completion of the Special Counsel's investigation.

⁴⁴ See DOJ Special Counsel Regulations, *supra* note 3, at 37041.

⁴⁵ See *id.*

The regulations also contain a tolling provision triggered by the Attorney General upon a finding that “legitimate investigative or privacy concerns require confidentiality.”⁴⁶ However, the confidentiality may not be permanent; Section 600.9(b) clarifies that when it is no longer necessary, notification will be provided.

Lastly, Section 600.9(c) permits the Attorney General to determine whether release of these reports is in the public interest, to the extent that release complies with the applicable legal restrictions. All public statements with respect to any Special Counsel investigation or prosecution must still comport with established DOJ guidelines for public release of information concerning criminal investigations.

§ 600.10 No Creation of Rights

Section 600.10 provides that the regulations do not “create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.”⁴⁷

II. RECENT INVESTIGATIONS

Within a few months of the effective date of the Special Counsel regulations, Attorney General Reno used them to appoint former Senator Jack Danforth to investigate allegations related to the siege of the Branch Davidian compound in Waco, Texas. Miss Reno’s action contrasts markedly with the actions taken since her departure; to my knowledge, the Special Counsel regulations have not been used since she left office. In recent years, two potentially “outside” investigations have arisen: (1) U.S. Attorney Patrick Fitzgerald’s investigation into the Valerie Plame identity disclosure matter, and (2) the recent CIA tapes investigation. The DOJ has not employed the Special Counsel regulations in either case. Instead, Mr. Fitzgerald was granted greater prosecutorial power than a Special Counsel would have under these regulations, while the CIA tapes matter did not utilize the Special Counsel model at all.

⁴⁶ 28 C.F.R. § 600.9(b).

⁴⁷ 28 C.F.R. § 600.10.

A. THE WACO INVESTIGATION

In August of 1999, a series of documents revealed that when the FBI raided the Branch Davidian compound, the FBI used flammable tear gas canisters. Since the FBI and the Department of Justice had earlier insisted that the government had done nothing that could have contributed to the start or spread of the fire, the documents raised serious questions about the Department's conduct and the possibility of a cover-up. Attorney General Janet Reno appointed former Republican Senator John C. Danforth, to study the raid on the compound to understand how the fire began and whether there was a cover-up.

On September 9, 1999, Attorney General Reno released a statement regarding her selection of John C. Danforth to head up the Waco investigation.⁴⁸ It provided:

Senator Danforth will have the authority to investigate whether any government employee or agent suppressed information relating to the events on April 19th; made false statements or misleading statements concerning those events; used any pyrotechnic or incendiary devices, or engaged in gunfire on that day; and took any action that started or contributed to the spread of the fire. In addition, he is authorized to investigate whether there was any illegal use of the armed forces...

Under the order⁴⁹ I have signed today, Senator Danforth will have the same authority as that which any Special Counsel would have under our new Special Counsel regulations.

As for any limited role that I would otherwise have in supervising such an outside inquiry, I have asked Deputy Attorney General Eric Holder to handle those duties since he was not involved in any way with Waco.

Senator Danforth similarly stated that he would have broad discretion to conduct the investigation as he saw fit. Furthermore, Attorney General Reno

⁴⁸ The statement can be found at: <http://www.usdoj.gov/opa/pr/1999/September/401ag.htm>

⁴⁹ Order No. 2256-99.

announced that she would recuse herself from the probe, in which she expected to be called as a witness.

Attorney General Reno's order, Order No. 2256-99, dated September 9, 1999, expressly states that "Sections 600.4 through 600.10 of Title 28 of the Code of Federal Regulations are applicable to the Special Counsel."⁵⁰ These are the Special Counsel Regulations discussed in Part I of this testimony. "Danforth [was] the first 'special counsel' appointed under [the] rules issued by the Justice Department after the independent counsel law expired in June [1999]."⁵¹

Attorney General Reno's decision to appoint a Special Counsel and her decision to recuse herself were appropriate because the alleged crimes being investigated specifically involved her. In such a case, the Department's conflict of interest is obvious. At the same time, the narrow scope of the Special Counsel's jurisdiction and the maintenance of a DOJ reporting chain limited the risk of a runaway independent counsel.

B. THE VALERIE PLAME INVESTIGATION

After a CIA employee's name was disclosed to a journalist, the Justice Department began an investigation into the source of the leak. The employee, Valerie Plame, is married to former Ambassador Joseph C. Wilson. The accusation was, in part, that high-level officials leaked Plame's name in order to punish Ambassador Wilson for his critical stance on a statement in the President's State of the Union address concerning weapons of mass destruction in Iraq.⁵²

On December 30, 2003, U.S. Attorney General John Ashcroft recused himself and his office staff from the investigation, and the Justice Department named a special prosecutor.⁵³ Deputy Attorney General James Comey appointed Patrick J. Fitzgerald, who at that time was the U.S. Attorney for the Northern District of Illinois, to lead the investigation.⁵⁴ To

⁵⁰ The order can be found at: <http://www.apologeticsindex.org/pdf/exhibits.pdf>

⁵¹ *Id.*

⁵² Ashcroft Recuses Self from CIA Leak Probe (Dec. 31, 2003), <http://www.foxnews.com/story/0,2933,106983,00.html>

⁵³ Ashcroft Steps down from CIA Leak Probe (Dec. 30, 2003), <http://www.cnn.com/2003/ALLPOLITICS/12/30/ashcroft.cia.leaks.reut/index.html>

⁵⁴ John Padilla & Alex Wagner, *The "Outing" of Valerie Plame: Conflicts of Interest in Political*

be clear, Mr. Fitzgerald was not a Special Counsel within the meaning of the regulations; in fact, he was empowered with significantly broader authority than the regulations provide for.

Mr. Comey stated that the selection of Mr. Fitzgerald, a sitting United States attorney, would permit “this investigation to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation. In addition, in many ways the mandate that [he was] giving to Mr. Fitzgerald [was] significantly broader than [the mandate] that would go to an outside special counsel” under the DOJ regulations.⁵⁵

During his press conference, Mr. Comey provided extensive detail about the power Mr. Fitzgerald was being given:

I have today delegated to Mr. Fitzgerald all the approval authorities that will be necessary to ensure that he has the tools to conduct a completely independent investigation; that is, that he has the power and authority to make whatever prosecutive judgments he believes are appropriate, without having to come back to me or anybody else at the Justice Department for approvals. Mr. Fitzgerald alone will decide how to staff this matter, how to continue the investigation and what prosecutive decisions to make.

[B]oth the attorney general and I thought it prudent -- and maybe we are being overly cautious, but we thought it prudent to have the matter handled by someone who is not in regular contact with the agencies and entities affected by this investigation. ...

The regulations promulgated in 1999 by Attorney General Reno say that an outside special counsel should...“be a lawyer with a reputation for integrity and impartial decision-making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies.”

Investigations after the Independent Counsel Act's Demise, 17 GEO. J. LEGAL ETHICS 977, 980 (2004).

⁵⁵ United States Information Agency, Transcript: Ashcroft Removes Himself From Probe Into Leak of CIA Agent Name (Dec. 30, 2003), available at <http://www.globalsecurity.org/intell/library/news/2003/intell-031230-usia01.htm>.

When I read that, I realized that it describes Pat Fitzgerald perfectly. ...My choice of Pat Fitzgerald, a sitting United States attorney, permits this investigation to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation. In addition, in many ways the mandate that I am giving to Mr. Fitzgerald is significantly broader than that that would go to an outside special counsel.

In short, I have concluded that it is not in the public interest to remove this matter entirely from the Department of Justice, but that certain steps are appropriate to ensure that the matter is handled properly and that the public has confidence in the way in which it is handled. I believe the assignment to Mr. Fitzgerald achieves both of those important objectives.

[T]he regulations prescribe a number of ways in which they're very similar to a U.S. attorney. For example, they have to follow all Department of Justice policies regarding approvals. So that means if they want to subpoena a member of the media, if they want to grant immunity, if they want to subpoena a lawyer -- all the things that we as U.S. attorneys have to get approval for, an outside counsel has to come back to the Department of Justice. An outside counsel also only gets the jurisdiction that is assigned to him and no other. The regulations provide that if he or she wants to expand that jurisdiction, they have to come back to the attorney general and get permission.

Fitzgerald has been told, as I said to you: Follow the facts; do the right thing. He can pursue it wherever he wants to pursue it.

An outside counsel, according to the regulations, has to alert the attorney general to any significant event in the case; file what's called an "urgent report." And what that means is just as U.S. attorneys have to do that, he would have to tell the attorney general before he brought charges against anybody, before maybe a significant media event, things like that. Fitzgerald does not have to do that; he does not have to come back to me for anything. I mean, he can if he wants to, but I've told him, our instructions are: You have this authority; I've delegated to you all the approval authority that I as attorney general have. You can exercise it as you see fit.

And a U.S. attorney or a normal outside counsel would have to go through the approval process to get permission to appeal something. Fitzgerald would not because of the broad grant of authority I've given him.

So, in short, I have essentially given him ...all the approval authorities that rest -- that are inherent in the attorney general; something that does not happen with an outside special counsel.⁵⁶

Mr. Comey also granted the authority exercised by the Attorney General without the “limits” imposed by the special counsel regulations in the following letter to Mr. Fitzgerald:

my ... delegation to you of "all the authority of the Attorney General with respect to the Department's investigation into the alleged unauthorized disclosure of a CIA employee's identity" is plenary and includes the authority to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, your investigation, ... my conferral on you of the title of "Special Counsel" in this matter should not be misunderstood to suggest that your position and authorities are defined and limited by 28 CFR Part 600.⁵⁷

Patrick Fitzgerald therefore had substantially more power and less supervision than a Special Counsel under the regulations. In general, I do not believe that this is a good model to follow. The Senate confirmed Mr. Fitzgerald as United States Attorney for the Northern District of Illinois. It did not confer upon him the full powers of the Attorney General, and that is effectively what Mr. Fitzgerald was delegated – “all of the authority of the Attorney General” to use Mr. Comey’s words. At the same time, he was less independent from the DOJ than the Special Counsel Regulations require in the sense that he was selected from within the Department. The fact that Mr. Fitzgerald is such a conscientious prosecutor and an unparalleled dedicated government servant obviously mitigated the structural harm of the way in

⁵⁶ United States Information Agency, Transcript: Ashcroft Removes Himself From Probe Into Leak of CIA Agent Name (Dec. 30, 2003), available at <http://www.globalsecurity.org/intell/library/news/2003/intell-031230-usia01.htm>.

⁵⁷ Letter from James B. Comey, Acting Attorney General, U.S. Department of Justice, to Patrick J. Fitzgerald, U.S. Attorney, Northern District of Illinois (Feb. 6, 2004) (available at http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_february_06_2004.pdf).

which the appointment was made. But in future cases, America may not be so lucky.⁵⁸

III. THE CIA TAPES

With this background on the origins of the DOJ Special Counsel regulations and the recent history of special counsels in mind, I turn to the current investigation into the destruction of the CIA tapes. I begin this section by addressing the provisions in the DOJ regulations dealing with the appointment of a Special Counsel and then apply that legal framework to the publicly reported facts concerning the DOJ's handling of its investigation into the destruction of the tapes. I then discuss what the possible advantages of appointing a formal outside Special Counsel might be, as well as whether there might also be disadvantages to using an outside Special Counsel for this investigation.

I conclude that the Justice Department appears to be compromised in its ability to oversee this investigation through normal prosecution channels. The Attorney General himself has subtly referenced this fact in recent testimony to this committee. He has testified that waterboarding

cannot possibly be the subject of a criminal – a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.⁵⁹

This statement underscores the complicated institutional dynamics of this investigation, one in which the Department is essentially being asked to investigate itself.⁶⁰ It is, quite literally, impossible to assess the Attorney General's claim without seeing those underlying opinions. These opinions

⁵⁸ Neal Katyal & Viet Dinh, *Enough Already: It's Time to Reign in Special Prosecutors*, WALL ST. JNL., Oct. 27, 2005.

⁵⁹ Testimony of Attorney General Mukasey before the House Judiciary Committee, Feb. 7, 2008.

⁶⁰ The inquiry into the legal authorizations for waterboarding and other extreme interrogation techniques by the Department's Office of Professional Responsibility (OPR) is no substitute for an independent criminal investigation. See Dan Eggen, *Justice Probes Authors of Waterboarding Memos*, WASH. POST (Feb. 23, 2008), at A3. Although the inquiry by the OPR can lead to disciplinary actions by state bar associations, OPR has no prosecutorial authority and so cannot replace a Special Counsel. It might be appropriate for this Committee, in its oversight role, to seek the final report and recommendations of the OPR with respect to this matter.

must be released to appropriate individuals in Congress. If they are not, the case for a Special Counsel will become much stronger.

Moreover, at a minimum, I believe that Congress should ask the Attorney General to apply the reporting requirements of the Special Counsel regulations to the current investigation. If the Attorney General decides not to approve a proposed course of action by the Special Counsel, the Attorney General should notify the relevant officials in Congress of his decision. This is a “special counsel-lite” provision that I believe will help further the appearance of impartiality and provide a greater zone of comfort to prosecutors and investigators as they carry out their tasks. This measure would be appropriate in this case because the Attorney General’s actions to date acknowledge the possibility of a conflict of interest with the Department, or at least the appearance thereof. And particularly in light of the bipartisan warning by the two Chairmen of the September 11 Commission, such a course of action is both prudent and appropriate: “What we do know is that government officials decided not to inform a lawfully constituted body, created by Congress and the president, to investigate one the greatest tragedies to confront this country. We call that obstruction.”⁶¹

A. The DOJ Regulations on Grounds for Appointing a Special Counsel

The first section of the DOJ regulations, entitled “Grounds for appointing a Special Counsel,” provide some limited guidance on when the Attorney General should consider a Special Counsel. There are three separate substantive prerequisites to the appointment of a special counsel: (1) the Attorney General determines a criminal investigation is warranted; (2) pursuing the investigation or prosecution through a U.S. Attorney’s office or regular DOJ channels would present a conflict of interest; and (3) appointment of an outside Special Counsel would be in the public interest.

To my knowledge, the Justice Department has not explicitly commented on how its handling of the CIA tapes destruction fits into this regulatory framework. That is, nobody in the Justice Department has publicly stated either what substantive evaluations have been made by the

⁶¹ Thomas H. Kean & Lee H. Hamilton, *Stonewalled by the CIA*, N.Y. TIMES, Jan. 2, 2008.

Attorney General as to whether a Special Counsel would be appropriate, or what procedural alternatives have been considered and chosen. We know that the Justice Department's National Security Division and the CIA's Office of Inspector General began a joint "inquiry" into the destruction of the tapes on December 8, 2007, in the immediate aftermath of General Hayden's announcement that they had been destroyed.⁶²

We also know that Attorney General Mukasey initially rejected calls for a Special Counsel, writing in a December 14, 2007 letter to Senators Leahy and Specter that "with regard to the suggestion that I appoint a special counsel, I am aware of no facts at present to suggest that Department attorneys cannot conduct this inquiry in an impartial manner."⁶³ He added, however, "If I become aware of information that leads me to a different conclusion, I will act on it."

Then, on January 2, 2008, Attorney General Mukasey announced that, based on a preliminary inquiry, he had "concluded that there is a basis for initiating a criminal investigation of this matter."⁶⁴ As he explained, the joint preliminary inquiry itself was used "to gather the initial facts needed to determine whether there is a sufficient predication to warrant a criminal investigation of a potential felony or misdemeanor violation."⁶⁵

On January 2nd, the Attorney General announced the opening of a formal criminal investigation into the destruction of the CIA tapes. He also announced the appointment of John Durham, the First Assistant United States Attorney in the District of Connecticut, to be the lead prosecutor on the case.⁶⁶ In technical terms, the Attorney General appointed Durham "to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter."⁶⁷ The Attorney General explained that "As the Acting United States Attorney for the purposes of this investigation, Mr. Durham will report to the Deputy Attorney General, as do all United States

⁶² Pamela Hess, *CIA, Justice Probe Destruction of Tapes*, AP Dec. 8, 2007 (quoting a letter from Kenneth Wainstein to John Rizzo).

⁶³ Letter of Michael Mukasey, Attorney General, to Senators Patrick J. Leahy and Arlen Specter (Dec. 14, 2007).

⁶⁴ Statement of AG Mukasey, Jan. 2, 2008.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Attorneys in the ordinary course.”⁶⁸ The reason cited by the Attorney General for this appointment of Durham is that the Eastern District of Virginia’s U.S. Attorney’s office, which would normally handle an investigation relating to the CIA, “has been recused from the investigation of this matter, in order to avoid any possible appearance of a conflict with other matters handled by that office.”⁶⁹

B. DOJ’s Investigation and the Special Counsel Regulations

I explained previously that there are three separate substantive prerequisites to the appointment of a special counsel: (1) the AG determines a criminal investigation is warranted; (2) pursuing the investigation or prosecution through a U.S. Attorney’s office or regular DOJ channels would present a conflict of interest; and (3) appointment of an outside Special Counsel would be in the public interest. The Attorney General’s actions and statements to date explicitly acknowledge only the first of these – that a criminal investigation is warranted in the matter of the destruction of the CIA tapes. But his recent statement about waterboarding suggests that the second, and possibly even the third, requirements may indeed be met in this case.

Attorney General Mukasey, however, has already limited the investigation by ruling out of bounds an investigation into the conduct that is depicted on the CIA videotapes. He has recently taken the position before this Committee that he did not want to open an investigation into waterboarding because individuals relied in good faith on legal opinions by the Office of Legal Counsel (OLC) from 2002 that waterboarding was permissible. The Administration has elevated these OLC opinions into a status akin to law – using them as definitive interpretations of this body’s work-product – legislation of the Congress of the United States. Just as our Founders would not have tolerated secret laws made by the Congress, they would not have tolerated a system of secret law by the Executive Branch.

Congress has in the past been shown sensitive national security OLC opinions as part of its oversight responsibilities. As I understand it, for

⁶⁸ Id.

⁶⁹ Id.

example, the Administration has let some members of the Intelligence Committees review the underlying legal opinions on the National Security Agency's Terrorist Surveillance Program, a program described by some as among this nation's most sensitive secrets. In previous Administrations, such compromises have unfolded as well. As Justin Florence and Matthew Gerke, two Fellows from Georgetown's Center on National Security and the Law, have recently noted:

In 1989, a similar conflict erupted between the House Judiciary Committee and the first Bush Justice Department over the FBI's kidnapping of criminal suspects abroad for prosecution in the United States. When news leaked out about a secret Office of Legal Counsel opinion saying that such kidnappings were legal, the Judiciary Committee asked for it, and the administration refused. The Committee issued a subpoena, the administration claimed executive privilege, and Committee threatened to hold DOJ in contempt. However, in the end, the Administration and the Committee eventually reached an 11th hour compromise, in which the Committee agreed to withdraw its subpoena and withdraw the threat of a contempt vote if several members of the committee were allowed to review the memo.⁷⁰

There are other possible scenarios in which one can envision a conflict of interest that would make the appointment of a formal outside Special Counsel appropriate in this matter. For example, a conflict of interest would likely arise if top lawyers or officials within the Justice Department or the White House become targets of the investigation. News reports indicate that several such officials were, in the words of one newspaper, involved "in the discussions before the destruction of the tapes in November 2005."⁷¹ In particular, according to these reports, White House Counsel and Attorney General Alberto Gonzales, counsel (and now chief of staff) to the Vice President David Addington, the senior lawyer at the National Security Council (and now in the State Department) John B. Bellinger III, and then-White House counsel Harriet Miers were involved in

⁷⁰ Justin Florence & Matthew Gerke, *A Tale of Two Investigations: Making the Best of the Destroyed CIA Tapes*, Jan. 16, 2008, available at <http://www.law.georgetown.edu/cnsl/ATaleofTwoInvestigations.htm>.

⁷¹ Mark Mazzetti and Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes* N.Y. TIMES (Dec. 19, 2007).

these discussions. Anonymous former officials have told the press that some at the White House did advocate destroying the tapes, while others disagree with that account. At the least, according to the *New York Times*, multiple former officials have said that “no White House lawyer gave a direct order to preserve the tapes or advised that destroying them would be illegal.”⁷² Each of these officials is entitled to all the hallmarks of our American system of justice, including the presumption of innocence. It serves no purpose to convict by innuendo, either in this august body or in the media. And I, like every American, hope that there was no White House involvement in any criminal activity relating to the decision to destroy the tapes.

But if Mr. Durham’s investigation into this matter determines that any of these individuals or other high-level White House or Justice Department officials did, in fact, order or authorize the destruction of the CIA tapes, then it would be appropriate to appoint an outside special counsel. If a White House or high-ranking Justice Department official becomes a target of investigation, it would present difficult questions about whether to prosecute that individual. For the reasons explained below, an outside Special Counsel would both be in a better position to make the decision about whether to prosecute one or more of these top Administration officials – and, if the outside counsel declined to prosecute, that decision would avoid the appearances of a conflict that would arise if a prosecutor within the Justice Department’s normal channels declined to prosecute.

C. Safeguards in the DOJ Special Counsel Regulations

For the reasons I discussed above, appointing a formal Special Counsel under the DOJ regulations would have a number of clear advantages. The Special Counsel is free from any day-to-day management by the Department.⁷³ He or she must notify the Attorney General of any important events in the course of the investigation, in accordance with DOJ’s guidelines with respect to Urgent Reports.⁷⁴ The Attorney General may review, and even overrule, actions by the Special Counsel. However, if the Attorney General overrules the Special Counsel, he or she must notify

⁷² Id.

⁷³ 28 CFR 600.7(b)

⁷⁴ 600.8(b)

Congress. Thus, although the Attorney General technically has the power to reign in wayward Special Counsels, the reporting requirement provides a crucial political check on the Attorney General's ability to control the investigation.

Even if the Attorney General makes no attempt to influence the conduct of the investigation, it is possible that career considerations could influence a prosecutor's handling of a matter. In order to minimize this risk, the regulations require that the Special Counsel be a "lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience" and, more importantly, that he or she come from outside the government.⁷⁵ Once appointed, the Special Counsel may be removed only for good cause (such as "misconduct, dereliction of duty, incapacity, conflict of interest, or ... violation of Departmental policies"),⁷⁶ and the Attorney General must notify Congress of the Special Counsel's removal.⁷⁷

The jurisdiction of a Special Counsel is designated by "a specific factual statement of the matter to be investigated" and also includes criminal investigations into obstructing the investigation.⁷⁸ If his or her investigation brings up new matters that are outside the scope of his or her original jurisdiction, the Attorney General may expand the scope of the Special Counsel's jurisdiction or begin a new investigation elsewhere in the Department.⁷⁹ Within this jurisdiction, the Special Counsel wields the power of a United States Attorney.⁸⁰

Mr. Durham's appointment has none of these safeguards. As Acting United States Attorney for the Eastern District of Virginia for this matter, Durham reports to the Deputy Attorney General, who may override his decisions without reporting to Congress.⁸¹ He comes from within the Justice Department and will, in all likelihood, return to his old position in the U.S. Attorney's Office in Connecticut (or a new position in DOJ) after he completes his investigation. Durham serves in his present capacity at the

⁷⁵ 600.3(a).

⁷⁶ 600.7(d)

⁷⁷ 600.9(a)(2)

⁷⁸ 600.4(a)

⁷⁹ 600.4(b)

⁸⁰ 600.6

⁸¹ Mukasey statement, January 2, 2008. http://www.usdoj.gov/opa/pr/2008/January/08_opa_001.html

pleasure of the Attorney General – and the next – who can terminate his appointment at will. It is important to note here again that I do not believe that Durham is likely to be influenced by these considerations; his record of conscientious independence speaks for itself. Nor is it likely that Attorney General Mukasey will deliberately attempt to influence the outcome of the investigation. These safeguards exist to protect the government – and the Attorney General – from the *appearance* of impropriety, in the event that the Department decides not to prosecute or to limit the scope of its investigation or prosecution. They mirror a key idea of our Founders, that our unique American government is based on the idea that checks and balances are laced into the system to guard against mistakes made by well-meaning individuals.⁸²

D. A Modest, Important Policy Suggestion: Reporting Requirements

As discussed in Part I, a key advantage of the Special Counsel regulations is that they require that the Attorney General report to Congress whenever he overrules a decision of the Special Counsel. Specifically, the Attorney General must notify Congress when he has “concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”⁸³ A provision modeled on the Special Counsel reporting requirement should be used to govern the CIA tapes investigation. The use of such a provision is justified by the high public interest in the matter and the publicly reported possibility of a conflict of interest with high level officials at the Justice Department and the White House.

Due to the unique circumstances of this case, I would urge that the reporting requirement also include notification to Congress about the initial scope of Mr. Durham’s mandate, as well as about any subsequent decisions by the Attorney General to refuse to expand the scope of the investigation pursuant to a request from Mr. Durham. This is because the direct investigation is into the destruction of evidence, but further investigation into the underlying conduct revealed by that evidence may be appropriate and will require independent review of the underlying OLC opinions

⁸² See Federalist Paper No. 51 (James Madison).

⁸³ DOJ Special Counsel Regulations, 64 Fed. Reg. 37038-01, 37038 (July 9, 1999) (codified at 28 C.F.R. pt. 600.9).

purportedly authorizing that conduct. The current Special Counsel regulations would require notification of the scope of the initial mandate in subsection 9(a)(1), and it is wise to mirror that decision in this specific matter. I would also urge that the reporting requirement in this case extend to reports about any subsequent decisions by the Attorney General where he refuses to expand the scope of the investigation pursuant to a request from Mr. Durham. The current Special Counsel regulations do not explicitly call for notification if the Attorney General refuses to expand the scope of the investigation, but in this unusual case, a reporting requirement of that nature is prudent as well.

I do not believe it wise for Congress to *require* such reporting via statute. Such a course of action would raise difficult questions about the President's "take care" power under Article II of our Constitution. But I believe that Congress should urge the Attorney General to commit to this course of action in this unique case, and that the Attorney General should accept this recommendation.

By "reporting to Congress," I mean only what the Special Counsel regulations require, that "[t]he Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House."⁸⁴ Given the classified and highly sensitive nature of these matters, limiting disclosure of such information to such individuals is appropriate.

Applying a modest reporting requirement will reassure the public that the Congress of the United States will be informed about any interference with such a sensitive investigation. And if, as I predict, no interference will occur, the reporting requirement will have little effect besides setting a precedent for how the Department should conduct other extremely sensitive investigations in the future.

CONCLUSION

Attorney General Mukasey's decision to appoint Mr. Durham is the first, not the last, step in the investigation process. It is appropriate for this body, and individuals at the Justice Department and elsewhere, to evaluate

⁸⁴ 28 C.F.R. pt. 600.9.

carefully whether a Special Counsel is warranted, particularly in light of the Attorney General's recent testimony that he will not permit an investigation into the conduct that is the subject of the CIA tapes, on the basis of secret opinions that the Congress of the United States has never seen. One modest way to help reassure the American public about the independence of the investigation is to insist that the Department of Justice follow the reporting requirements in the Special Counsel regulations in Mr. Durham's investigation. Indeed, the regulations' reporting requirement should be expanded slightly in this unique case to encompass decisions about the scope of the investigation as well.

I commend this subcommittee for holding this hearing today. The Special Counsel regulations provide an appropriate model for investigations where independent judgment is required, and Congress should urge the Department of Justice to apply, at a minimum, its principles to the CIA tapes investigation.

Thank you.